THE NEW CRIMINAL PRELIMINARY EXAMINATION IN OHIO: AN HISTORICAL CONTRAST

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A far-reaching reorganization and standardization of criminal procedure in Ohio was enacted by the 103d General Assembly with the passage of Amended Senate Bill No. 73 effective January 1, 1960 ". . . making practice and procedure in the trial of criminal offenses uniform in courts inferior to the court of common pleas." Although the Bill directly affects matters of arrest, bail, and the trial of misdemeanors,[1] the key provisions have the effect of revising the criminal preliminary examination in Ohio for the *first* time in ninety years.

In Ohio the preliminary examination is held almost exclusively before county or municipal court magistrates,[2] since after January 1, 1960 mayors will no longer have this capacity,[3] and there existed in 1959 only two police courts, at Marietta and Ottawa Hills. The purpose of the examination is twofold. It provides a procedure inquiring in character, but adversary in form[4] designed to make possible the summary disposition of misdemeanors: few serious legal issues are presented by this part of the examination's function at the present time[5] outside of problems of volume

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[1] Amended Senate Bill No. 73 embraces Chapter 2935, Arrest; Chapter 2937, Arraignment-Preliminary Examination-Bail; Chapter 2938, Trial of Misdemeanors and Ordinance Offenses in Courts Inferior to the Court of Common Pleas. The scope of this article is limited to the preliminary examination section of Chapter 2937.

[2] The county court magistrate may hear all felony and misdeameanor examinations which arose in his district, and those cases within the county where he sits, if special circumstances exist, see OHIO REV. CODE § 2931.02 (1958). The municipal court magistrate has territorial jurisdiction over misdemeanors, jurisdiction over crimes committed within the county wide jurisdiction of county courts, and power to hear all felony cases committed within its territory, see OHIO REV. CODE § 1901.20 (1953). Mayor's courts have qualified misdemeanor jurisdiction, see OHIO REV. CODE §§ 1905.02-.19 (1953). Ohio's two police courts have, in general, municipal misdemeanor jurisdiction, see OHIO REV. CODE §§ 1903.06-.20 (1953).

[3] OHIO REV. CODE § 1907.031 (1958).

[4] In England the process was founded upon inquisitorial power, Statute, 1554, 1 & 2 Phil. & M., c. 13 § 4. See HOLDSWORTH, HISTORY OF ENGLISH LAW 529 (1923), 1 STEPHEN HISTORY OF THE CRIMINAL LAW OF ENGLAND 217 (1883). In France, the *juge d'instruction* has broad investigatory and interrogatory powers unlike American procedure. See Keedy, *The Preliminary Investigation of Crime in France,* 88 U. PA. L. REV. 385, 693 (1940); Freed, *Aspects of French Criminal Procedure,* 17 LA. L. REV. 730 (1957).

[5] Where a magistrate did not have jurisdiction over a particular misdemeanor, he could only, in past practice, conduct a preliminary examination. See Sprague v. State *ex rel.* Staples, 34 Ohio App. 354, 171 N.E. 259 (1930); State *ex rel.* Overholser v. Wolf, 5 Ohio L. Abs. 415 (1927); Rockwell v. State, 2 Ohio L. Abs. 666 (1924). See also 29 OHIO JUR. *Municipal Courts* § 60 (1933). OHIO REV. CODE § 1907.012 (1958), gives final misdemeanor jurisdiction to the county courts.

brought about by traffic offense jurisdiction. The second, and more important function of the examination is the determination of whether there is "probable cause" to hold a person accused of a felony for appearance before the grand jury for possible indictment, the Ohio Constitutional requirement for felony prosecutions.[6]

Problems raised in the past administration of criminal justice have shown beyond a doubt that laws, as well as those who champion their spirit, must be geared to the issues of the day. This is particularly true of the preliminary examination. While one hundred years ago the informality of criminal process might have been justified by the infrequency of injustice, conditions of our day demand the clear, orderly, and just administration of our criminal procedure.

The draftsmen of the reorganization Bill—a sub-committee of the Criminal Law Committee of the Ohio State Bar Association—created a meeting ground of theory and practice articulated in clear concise statutory form. The language of the past, scattered about in sometimes unrelated parts of the Code created disorganization in practice. The new reorganization yields a fresh, step-by-step modern preliminary examination.

While in the past, legal assistance was often engaged at a time *too late* in the criminal process to make effective use of the preliminary examination, the new procedure will offer the accused more reason to require counsel *at the examination,* in every kind of case. Defense counsel and prosecution alike will therefore be faced with new problems of substance, as well as with the new procedure, creating a significant impact upon criminal practice.

The true emphasis of the reorganization is characterized in the following discussion by a comparative analysis of the historic foundations of the preliminary examination in Ohio and its development, to be contrasted with a structural classification of the new procedure. By such a dual separation the growth and origin of the procedure is stressed and the nexus between old and new adds a visible background, if not material substance to the meaning and purpose of the preliminary examination in present day practice.

Historical Bases

Colonial Influence Experience of early legal structures in our country profoundly influenced the succeeding territorial and state governments. Patterned after that of the mother country, colonial criminal procedure was first governed by English precedent; a basis for a preliminary exam-

[6] Ohio Const. art., 1 § 10 (1851). See interpretation in Stewart v. State, 41 Ohio App. 351, 181 N.E. 111 (1932). In Ohio the felony misdemeanor distinction rests only upon possible punishment: "Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. As used in the Revised Code 'minor offense' is synonymous with misdemeanor." Ohio Rev. Code § 1.06 (1953).

ination is traceable in England even as far back as 1194, the coroner's inquest.[7] For example, criminal practice in the Virginia Colony involved two preliminary steps. One charged with a felony who could not furnish bail was first taken before a justice of the peace, and held in custody until he was discharged by "due Course of Law." This meant punishment and release, remedial proceedings in habeas corpus, *or* the important procedure of the Examining Court, or "called court" as it was then termed—the second step. The theory of the Examining Court was basically English, but the Colonial counterpart during the 1600's—and formally organized in 1705—was a unique departure from English practice. The English model was geographically permanent; the Colonial derivation travelled to the location of imprisonment. Since all serious criminal trials were held at the capital in Williamsburg, travel was expensive and time-consuming. The Examining Court was the "sifting process" that assured reasonable probability of conviction when an accused was sent for trial. A justice of the peace confronted with one charged with a serious crime directed the sheriff to summon an Examining Court within a fixed period of time. Upon arrival of the court, witnesses—including the accused's own if he so desired—were questioned. The accused was questioned *not* under oath. Testimony was recorded and witnesses were required to give bond if the court decided to send the prisoner to the capital.[8]

Ohio: The Northwest Territory When Territorial government was organized in 1787, substantive criminal law and enforcement procedure were drawn with close reference to Colonial examples. Within the Territorial judicial structure,[9] the justice of the peace court was the most important at the first stage of criminal procedure. While jurisdiction in the disposition of cases was limited,[10] the justice did sit as a preliminary examiner, and could take recognizance—bail—for the appearance of the

[7] 1 STEPHEN, *supra* note 4.

[8] SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 55 (1930), ". . . Besides discharging a person or remanding him for trial for his life, the Examining Court might bind him over to the next grand jury at the County Court." Scott cites, *supra* at 60, n. 41 some interesting history: "Orange County Examining Courts, 1735-75 (1740-41 missing); thirty-seven years. Sixty-one called courts to examine 79 criminals, 3 of whom were examined on two different charges in different years. Of these 82 cases, 33 were held for trial at Williamsburg; 14 were whipped by the Examining Court and discharged; 12 were held to the county grand jury; and 23 were discharged. Figures compiled from the County Recs. (MSS)."

[9] LAWS OF THE NORTHWEST TERRITORY, ch.2, Aug. 23, 1788 established the Territorial courts: (a) Justice of the Peace, jurisdiction over petit crimes and misdemeanors; (b) Courts of Quarter Sessions of the Peace (the Justices of the Peace were part of this court, and when out of term had jurisdiction for petit crimes and misdemeanors) had power to hear, determine, and sentence *all* crimes and misdemeanors of any kind or nature; (c) County Courts of Common Pleas, civil jurisdiction only; (d) Probate Courts, jurisdiction over intestate and testate property matters; (e) General Court, jurisdiction over criminal and civil matters, meeting only four times yearly durng the early years.

[10] LAWS OF THE NORTHWEST TERRITORY, ch.2, Aug. 23, 1788.

accused at the upper court. 1798 Territorial legislation adopted from the Massachussets Code fixed the *first* examining jurisdiction:

> . . . the justices of the peace shall examine into all homicides murders, treasons and felonies done and committed in their respective counties and commit to prison all persons guilty or suspected to be guilty of manslaughter, murder, treason or other capital offence and to hold to bail all persons guilty or suspected to be guilty of lesser offenses which are not cognizable by a justice of the peace . . . and . . . examine into all other crimes, matters and offences which by particular laws are put within their jurisdiction.[11]

The Territorial period of fifteen years witnessed no attempt to broaden the preliminary procedure. The Virginia Examining Court device apparently was not then necessary because of the minute territorial population, contrasted with almost one hundred years of Colonial inhabitation in Virginia.

Ohio Statehood: The Early Experience Ohio became a state in the latter part of 1802, and the First General Assembly which met on March 1, 1803, abolished all Territorial Courts[12] and repealed the existing modes of criminal procedure.[13] Common Pleas courts were given outstanding criminal jurisdiction except for capital crimes which were to be tried exclusively in the Supreme Court.[14]

Judicial organization and population growth were important factors in the shift in criminal procedure which developed from the early years of statehood until 1869. Preliminary examination developed into *two* distinct types of procedures. First, the established procedure of justice of the peace "examination"[15] was gradually augumented. Second, the very important procedure of the Examining Courts was created.

The Justice of the Peace

As in the Territorial days, the justice of the peace was given an inquisitorial power over those accused persons properly before his court.

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[11] LAWS OF THE NORTHWEST TERRITORY, ch. 77, May 1, 1798. For an interesting historical discussion of statutory effect of English law, see POLLACK, OHIO UNREPORTED JUDICIAL DECISIONS 204-219 (1952).

[12] OHIO LAWS, ch. 7 § 28, April 15, 1803.

[13] LAWS OF THE NORTHWEST TERRITORY, ch. 77, May 1, 1798 *repealed by* OHIO LAWS, ch. 47 § 24, Feb. 17, 1804, and OHIO LAWS, ch. 113 § 1, Feb. 22, 1805.

[14] OHIO LAWS, ch. 7 § 4, April 15, 1803.

[15] The statutory language remained unchanged, the repeal and reenactment as follows, from 1804 through 1824: OHIO LAWS, ch. 47, Feb. 17, 1804, *infra* note 16, *repealed* and substance re-enacted by OHIO LAWS, ch. 54, Feb. 12, 1805. The latter chapter was amended by OHIO LAWS, ch. 124, Jan. 22, 1806 (non-criminal); both chapters 54 and 124 amended by OHIO LAWS, ch. 174, Feb. 20, 1808 (non-criminal). OHIO LAWS ch. 179, Feb. 18, 1809 *repealed* and substantially re-enacted OHIO LAWS ch. 54, 124, 174. OHIO LAWS, ch. 327, Feb. 11, 1814 *repealed* and re-enacted substance of chapter 179. OHIO LAWS, ch. 475, Feb. 16, 1820 *repealed* and re-enacted chapter 327. OHIO LAWS ch. 636, Feb. 25, 1824 *repealed* and re-enacted substance of chapter 475.

General statutory authority was for many years the only basis for preliminary examination, the foundation for the now departed justice of the peace and *present* county court procedure.[16]

> . . . and they are hereby authorized and required on view or complaint made, on oath, to cause any person, charged with a crime, or a breach of the laws of this state, to be arrested and brought before him or some other justice of the peace . . . and such person to commit, discharge or let to bail, as the nature of the case may require . . .[17]

Although justice jurisdiction was realigned in 1831,[18] the status of of the procedure remained the same through 1869, with some additions,[19] and represents no marked variance with today's county courts. Final jurisdiction of the justice courts was, of course, limited.[20]

The Examining Court

Because of the limits placed upon justice of the peace final jurisdiction, many persons accused of crime were placed in jail following the justice's "inquiry." Many, of course were never afforded this first step, but even held in jail without *any* hearing. This lack or protection and formalism in the justice courts led to the creation of a special Examining Court in 1806 composed of the associate judges of the court of common pleas; an adoption of the Virginia example. Cases involving possible capital punishment *required* this examination; in other cases, *both* felony and misdemeanor, the examination could be demanded. The provision for capital offenses illustrates the mode of procedure:

> That when any person . . . shall be charged with any capital offence and apprehended for the same, he . . . shall have a special court of common pleas within fifteen days after he . . . shall be apprehended; and the associate judges are hereby required, within fifteen days after any person . . . shall be so charged and apprehended, to hold a court for the purpose of hearing testimony for and against the said criminal . . . and if the said court shall be of the opinion from the testimony, that it is not sufficient to create a suspicion of guilt, then the said court shall dismiss such criminal . . . but if the said court shall be of opinion that the testimony is sufficient to create a suspicion of guilt, then the said court shall admit such criminal

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[16] See note 31 (b) *infra.*

[17] OHIO LAWS, ch. 47 § 1, Feb. 17, 1804.

[18] OHIO LAWS, ch. 837, March 11, 1831, *repealing* OHIO LAWS, ch. 636, *supra* note 15.

[19] 35 OHIO LAWS 87, March 27, 1837 *repealed* OHIO LAWS, ch. 837, *supra* note 18, and substantially re-enacted the same. 53 OHIO LAWS 37, March 29, 1856 added section 46 to the act, affixing punishment on a plea of guilty, or discretion to recognize to the upper court.

[20] In criminal proceedings the justice of the peace court, from its inception in 1788, see note 9 *supra,* to its abolishment in 1957, had only final misdemeanor jurisdiction in some cases, general in the early years and limited later with the establishment of police and municipal courts.

> . . . to bail (the sufficiency of which the court shall determine) or confine him . . . in the jail of the proper county, for his . . . further trial; and after any person or persons shall be let to bail, or confined for further trial, it shall be the duty of the prosecuting attorney to proceed as heretofore required.[21]

This Examining Court, like the Virginia "called court", was a travelling court, upon notice and call. The practical reasons for its adoption stem from the fact that a preliminary process was necessary to prevent groundless prosecutions in the criminal courts, and the accused needed more protection than was previously afforded.

In the following years, clarification and extension of policy gave the Examining Court a wider scope.[22] An important variation was enacted in 1852, when *one judge* of the Probate Court was substituted for the associate judges of the common pleas court[23]—the basis for the *present day* Examining Court.

Ohio Revision: 1869 With the formative years in the past, Ohio in 1869 embarked upon an era of procedural organization. The first Code of Criminal Procedure of Ohio was instituted by the General Assembly on May 6, 1869.[24] Justice of the peace procedure remained substantially

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[21] OHIO LAWS ch. 125 § 3, Jan. 27, 1806. There is a decided possibility that the English origin of the Examining Court developed from the ancient writ of *de odio et atia,* referred to in the Magna Charta, prior to the year 1000, see 1 STEPHEN, *supra* note 4 at 242 ". . . it is at all events clear that the effect of the writ was to cause a preliminary trial to take place in cases of homicide, the result of which determined whether the accused should be admitted to bail or imprisoned till he was finally tried."

[22] OHIO LAWS, ch. 151, § 4, Feb. 4, 1807, *repealing* and substantially re-enacting OHIO LAWS, ch. 125 § 3, did not separate the statute sections in terms of the grade offense accused; the sitting of the court was made by request; a three day notice and a fifteen day period was substituted, and the sheriff automatically appointed the *date* of the court. Later, the time limit was completely abolished, making only a three day notice to the associate judges required, OHIO LAWS, ch. 158 § 14, Feb. 17, 1808 *repealing* and substantially re-enacting OHIO LAWS, ch. 151. Chapter 158, also required the court to compel the attendance of witnesses. In 1810 the clerk of courts and prosecuting attorney were required to be notified, OHIO LAWS ch. 243, §§ 106-108, Feb. 16, 1810, *repealing* and substantially re-enacting OHIO LAWS, ch. 158.

Further history: OHIO LAWS, ch. 384, § 108, Feb. 23, 1816 *repealed* OHIO LAWS, ch. 243, without re-enacting the same. OHIO LAWS, ch. 386 § 1, Feb. 26, 1816 enacted the same examining court provision as formerly, with slight change. Enactment and repeal: OHIO LAWS, ch. 597 § 1 (1824); 29 OHIO LAWS 155 § 1 (1831); 50 OHIO LAWS 97 § 1 (1852); 66 OHIO LAWS 287, 294 § 48 (1869).

[23] 50 OHIO LAWS 97, March 12, 1852, *repealing* OHIO LAWS, ch. 832.

[24] 66 OHIO LAWS 287-335, May 6, 1869. The Act was in 10 titles. Title II was "Of Arrest, Examination, Committment and Bail"; Article II consisted of "Examination" (sections 30-42) and Article III was "Bail" (sections 43-66). Regarding the source of the Code, compare the original Field Code of Criminal Procedure with Livingston's Code, printed at 2 LIVINGSTON, CRIMINAL JURISPRUDENCE 237 (1873).

the same as before: inquiry into the complaint, discharge or recognizance.[25] Later, county-wide jurisdiction was curtailed and limited to cases instituted in the justice court by the prosecutor, sheriff, or other enumerated officials.[26]

The organizetion of the Code of Criminal Procedure brought to Ohio a long overdue, specifically defined preliminary examination of *first instance*. Prior to 1869 the Examining Court was the only *dependable* legal safeguard offered to an accused. The Code, however, explicitly defined the preliminary examination, the foundation for that criminal procedure until the present reorganization of 1959. In short the Code provided for delivery of an arrested person and the warrant, to a proper magistrate. Pleas were permitted; guilty on a misdemeanor charge *if* on complaint of the party injured, in the magistrate's discretion. The accused was to be bound over to the common pleas court automatically if proable cause was found—where the injured party did *not* complain.[27] A finding of probable cause justified recognizance of witnesses, and bail for the accused in felony cases—if the offense was bailable.[28] If no probable cause was found, the accused was to be discharged.[29]

Because of this new procedure of first instance, the Examining Court took on a completely *different* function. The Court became a further safeguard, *after* the preliminary examination, significant where the offense charged was not bailable, or where bail required by the magistrate was financially beyond the means of the accused. Furthermore the Court provided a more stringent search for probable cause, and the Court *could* require bail of a different amount than the magistrate; *viz*: within the accused's means. The contrast between the Examining Court legislation, as it appeared in the 1869 Code, and the earlier legislation referred to above, is significant.[30]

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[25] All prior justice of the peace criminal procedural acts were repealed by 66 OHIO LAWS 287 § 225 (1869), except §§ 24-29 and 33 of 35 OHIO LAWS 87, March 27, 1837 (forms and constables). 66 OHIO LAWS 287 §§ 1, 13, 23 and 30 re-established existing procedure.

[26] 113 OHIO LAWS 123 (1929). Analagous county court section, see present OHIO REV. CODE § 2931.02 (1958).

[27] 66 OHIO LAWS 287, at 292, 293, §§ 30, 31 and 34 (1869).

[28] 66 OHIO LAWS 287, at 293, 294, §§ 35-41, and 43 (1869).

[29] 66 OHIO LAWS 287, at 293 § 37 (1869).

[30] 66 OHIO LAWS 287 at 294, § 48 (1869), "When any person shall have been committed to jail charged with the commission of any crime or offense, and wishes to be discharged from such imprisonment, the sheriff or jailor shall forthwith give to the probate judge, clerk and prosecuting attorney of the proper county, at least three day's notice of the time of holding an examining court, whose duty it shall be to attend, according to such notice, at the court house; and said judge having examined the witnesses (the person charged included, if such person shall request an examination), shall discharge the accused, if he finds there is no probable cause for holding him to answer; otherwise he shall admit him to bail or remand to jail; and said probate judge shall have power to adjourn from day to day, during such examination, or for such longer period as he shall deem necessary

With the institution of a magistrate's preliminary examination established in the first stage of criminal proceedings, the era of structural development was at an end. The justice of the peace "inquiry" statute remained, as did the very important procedure of the Examining Court. The shift from the 1870's to the 1950's was one of legislative clarification, rather than basic fundamental change.[31] Introduction to the new procedure, however, calls upon a different theme. Basic theory, of course, remains stable, and judicial duties as well as individual rights are shaped around the practice as it developed. But, the procedure is characteristically different.

THE NEW PROCEDURE

Reorganization of the preliminary examination is grounded upon two basic but important premises: formal chronological organization, and foremost protective opportunity for the individual. In such a proceeding the stress must be principally upon efficiency and utility, combined with sufficient safeguards for the accused. Practical formality in the new legislation should ideally satisfy demands by prosecution, defense, and judiciary, for efficient yet protective administration of criminal justice.

While a few sections of the old procedure remain unchanged,[32] the new process is a fresh innovation. Categorically the logical organization of the preliminary examination lends itself to a division composed of several steps or phases.

Informing the Accused—Opening Announcement One accused of crime—felony or misdemeanor—must be brought before a court or magistrate[33] either pursuant to arrest, or upon summons or notice. Section 2937.02 provides that the first duty of the court or magistrate in all cases

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for the furtherance of justice, on good cause shown by the state or accused."

[31] *Subsequent development from 1869 to the present.*

(a) *Preliminary examination*: See 73 OHIO LAWS 219 (1876); 80 OHIO LAWS 141 (1883); 82 OHIO LAWS 149 (1885); 92 OHIO LAWS 98 (1896). From 1910-1952 the following were added: 113 OHIO LAWS 123, ch. 12 §§ 2,4,5,12,13,19 (1929); 114 OHIO LAWS 320, 479 (1930).

(b) *Justice of the Peace.* See 113 OHIO LAWS 123, 215 (1929). The successor to the justice of the peace court, in 1958, the county court, has substantially the same criminal jurisdiction as the former, see OHIO REV. CODE § 2931.02 (1958): ". . . on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before him or another judge of a county court, and . . . to inquire into the complaint and either discharge or recognize him to be and appear before the proper court . . . or otherwise dispose of the complaint . . . ."

(c) *Examining Court*: See 113 OHIO LAWS 123, 215 (1929); 115 OHIO LAWS 530 (1933). For structural changes from inception to 1869 see note 22 *supra.*

[32] OHIO REV. CODE §§ 2937.16 (recognizance of witnesses); 2937.17 (recognizance for minor); 2937.18 (witness' refusal to enter into recognizance); 2937.20 (court disqualified to act) (1953).

[33] The definition of magistrate under former procedure controls; OHIO REV. CODE § 2931.01 (1957).

is to make an opening informative announcement to the accused, including: the nature of the charge, and the identity of the complainant, permitting the accused or his counsel to see and read the affidavit, complaint, or a copy; that the accused has the right to have counsel *immediately* and the right to a continuance to enlist aid of counsel; a statement about the effect of a plea of Guilty, Not Guilty, and—in misdemeanor cases—No Contest. And, the accused must be appraised of his right to trial by jury and the necessity of making a written demand. If the offense charged is a *felony*, the accused must be informed of the nature and extent of possible punishment, and of his right to what is termed in the statutes, a preliminary *hearing*.[34]

Arraignment The second step, section 2937.03, requires reading the substance of the affidavit or complaint to the accused, unless he waives such a reading. This is a first stage arraignment, within the preliminary examination. At this point in the proceeding, inquiry is made by the judge or magistrate as to whether the accused understands the nature of the charge. If there is no indication of understanding, the judge or magistrate must give a legal explanation to the accused. The absolute right to counsel is here preserved with a provision requiring continuance[35] if the accused has no counsel and wishes representation, the magistrate setting bail if the offense is bailable. In cases where the offense is not bailable or where the accused cannot make bail, an excellent protective provision requires that the officer in custody make available a telephone for arrangement for counsel or bail, *or* that the officer take a message to any attorney within the municipality where the accused is confined. This should secure adequate legal representation at the first instance.

Motions In cases where the accused does not desire counsel, or upon the expiration of a granted continuance to engage counsel, the new procedure provides for a motion to *dismiss* the complaint or affidavit.[36] The motion may be either oral and ruled upon at presentation, *or* in writing and set for argument at a later time, upon testimony or affidavits, where necessary.[37] The motion will be quite useful in misdemeanor cases where technical flaws in form appear, or where the statute of limitations has run. The accused has available any exception which could be asserted against an indictment or information by a motion to quash, a plea in abatement, or demurrer.

Section 2937.05 provides for discharge of the accused upon the sustaining of a motion made, unless the defect can be corrected without changing the nature of the charge. This is to be effected by amending the

[34] The term is used within the statute for the first time, although admittedly it has been much referred to in practice. 'Examination' now is the *entire* process, misdemeanor and felony.

[35] See note 48 *infra*.

[36] Section 2937.04.

[37] Proof by testimony or affidavits is permissible where ". . . the motion attacks a defect in the record by facts extrinsic thereto . . . .", section 2937.04.

complaint or filing a new affidavit, reswearing the affiant. The new section should do away with the rather useless procedure of "amending the warrant," provided for in the past.[38] The sustaining af any motion, of course, is *not* a bar to further prosecutions—felony or misdemeanor.

Pleas Upon the disposition of any motions, or if no motions are made, the next step in section 2937.06 *requires* the accused to formally plead to the charge. Here the statutory arrangement draws a procedural distinction between misdemeanors and felonies, but pleas are mandatory in either instance.

Misdemeanors

A person accused of a misdemeanor is entitled to one of four pleas, and a plea will have the effect of waiving any objection that could have been raised by previous motion.[39] The plea of Guilty, used quite extensively in traffic cases, is receivable by the court or magistrate *unless* he believes it has been made because of mistake or fraud, in which case a plea of Not Guilty is entered. Upon an explanation of surrounding circumstances from the affiant, complainant or his representative, and a statement of the accused, sentence is pronounced or that matter continued.

A plea of No Contest—new in Ohio—is permitted and authorized by the new procedure in misdemeanor cases only. The plea has the useful aspect of not being subject to construction of an admission of guilt in a later civil or criminal action. This makes for a very valuable change in our procedural law. The plea constitutes a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of circumstances, imposing sentence or continuance accordingly.[40]

When an accused pleads Not Guilty or Once in Jeopardy, the other two permissible misdemeanor pleas, the matter must be set for trial before a court or jury, depending upon circumstances. A *dual* distinction is established in the new procedure. If the charge is a misdemeanor in a court of *record*, the trial may be set for a future time, with the accused let to bail in the interim, or with the consent of the prosecutor and accused, set for disposition *forthwith*. If the court is *not* of record, and the offense does *not* require a jury trial, trial may be set in the future, or *forthwith*, if prosecutor and accused consent.[41]

In a court *not* of record, where the right to a jury trial exists, the matter cannot be tried by the magistrate *unless* the accused waives a jury and *consents* to be tried by the magistrate *in writing*. When there is no waiver the cause is to be transferred to a court *of record* within the county, with the accused recognized to appear, if necessary. It is expressly pro-

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[38] *Report of Criminal Law Committee*, 31 OHIO BAR 411, 431 (May 12, 1958).

[39] Section 2937.06.

[40] Section 2937.07.

[41] Section 2937.08.

vided that this transfer will not require the filing of any indictment or information.[42]

The new section effectively precludes jury trials in courts which probably are not well equipped to provide them.[43]

Felonies

Where the offense charged is a felony, *only* a plea of Not Guilty or a *written* plea of Guilty is permitted. The requirement of a *written* Guilty plea is an innovation of obvious merit. Before accepting a plea of Guilty the court or magistrate is required to advise the accused that the plea constitutes an admission which may be used against him at trial. When the accused enters a written Guilty plea or pleads Not Guilty and waives the right to have evidence taken, the magistrate or court has the option of either determining automatic probable cause—binding the accused to the Common Pleas court pursuant to indictment, *or* proceeding with the taking of evidence. Thus, the accused's waiver may or may not be effective. The automatic finding is permissive and not mandatory.[44]

Upon a plea of Not Guilty, *or* when the accused does not plead—and a plea of Not Guilty is entered for him[45]—*or* if the waiver of examination on a Guilty or Not Guilty plea is refused by the court or magistrate, the matter is *automatically* continued for hearing unless the prosecutor and accused consent to a hearing *forthwith.*[46] The effect of this provision should curtail the much criticized perpetual continuance,[47] since the ten day limit has been rephrased and enacted within the new procedure.[48]

Proceedings at the Preliminary Hearing The "hearing"—the last-stage *felony* procedure of the preliminary *examination,*[49] will have been

[42] *Ibid.*

[43] "An additional objective of this proposal is to permit transfers to "courts of record" generally, not merely to Common Pleas Court, which frequently means running speeding and right of way cases through the grand jury at great bother and little gain." *Report of Criminal Law Committee,* note 38, *supra* at 433.

[44] Section 2937.09. This section makes the preliminary hearing dispensable where it may not be expeditious or desirable.

[45] Section 2937.06.

[46] Section 2937.10. "This provides for automatic continuance for hearing unless all concerned consent." *Report of Criminal Law Committee,* note 38, *supra* at 434.

[47] For example, an article appeared in the Cleveland Plain Dealer declaring: "Fed up with the Municipal Court continuances given a frequently arrested man who is charged with three felonies . . . detectives yesterday asked for and got assurance that the cases could be presented directly to the grand jury." Cleveland Plain Dealer, April 11, 1958, p. 14, col. 1.

[48] Section 2937.21 provides that no continuance at any stage, including that given for determination of a motion extend for more than 10 days, unless the accused and the state consent. Continuance or delay in ruling contrary to the 10 day provision, unless procured by the accused or his counsel is grounds for discharge of the accused forthwith.

[49] "Hearing" appears in sections 2937.02, 2937.10, 2937.11, 2937.15. See note

set at the pleading stage, or held at once with both parties' consent. The procedure will begin with the prosecutor stating the case for the state, although he is *not* required to do this. An examination of witnesses and introduction of exhibits for the state follows. The rules of evidence prevailing in criminal trials are binding here, with the accused and the magistrate having the full right of cross examination. Cross-examination under past procedure had been a presumed right,[50] based upon the language "The rules of evidence in civil causes, where applicable, govern in all criminal causes."[51] And statements of witnesses given at the preliminary examination can be admitted at later trial under certain circumstances.[52]

The accused under the new procedure may examine any exhibits of the state prior to their introduction at the hearing. Furthermore, separation of witnesses is provided, as under the old procedure, upon motion of the state or accused.[53]

> Section 2937.12 provides the key points of the hearing:
> (A) At the conclusion of the presentation of the state's case accused may move for discharge for failure of proof or may offer evidence on his own behalf. Prior to the offering of evidence on behalf of the accused, unless accused is then represented by counsel, the court or magistrate shall advise accused:
> (1) That any testimony of witnesses offered by him in the proceeding may, if unfavorable in any particular, be used against him at later trial;
> (2) That accused himself may make a statement, not under oath, regarding the charge, for the purpose of explaining facts in evidence;
> (3) That he may refuse to make any statement and such refusal may not be used against him at trials;
> (4) That any statement he makes may be used against him at trial.[54]

34, *supra.*

[50] A.L.I. CODE OF CRIM. PROCED. § 46 (1930); Miller, *The Preliminary Hearing*, 15 A.B.A.J. 414, 415 (1929); FED. R. CRIM. P. 5(c).

[51] OHIO REV. CODE § 2945.41 (1953).

[52] These statements are admissible providing ". . . the witness . . . dies, or . . . becomes incapacitated to testify . . . .", OHIO REV. CODE § 2945.49 (1953); see 15 OHIO JUR. 2d *Criminal Law* § 415-421 (1955). Good cause must be shown for the witness' incapacitation in order to admit the earlier testimony, Mitchell v. State, 40 Ohio App. 367, 178 N.E. 325 (1931).

[53] Section 2937.11.

[54] Under former practice pleas and admissions against interest were long accepted as competent evidential matters. State v. Jackson, 25 Ohio L. Abs. 229 (1937); Booker v. State, 33 Ohio App. 338, 169 N.E. 588 (1929); *cf.* Smith v. State, 24 Ohio C.C. Dec. 526 (1912) where the examining magistrate was permitted to testify at the trial to an admission of guilt made before him. See also, Annot., 141 A.L.R. 1335 (1942). The limit of admissibility is the use of "Forced confessions" and the use of the "third degree." See generally MORELAND, MODERN CRIMINAL PROCEDURE 91-99 (1959); Warner, *How Can The Third Degree Be Eliminated?* I BILL OF RIGHTS REV. 24 (1940); Kauper, *Judicial Examination of*

> (B) Upon conclusion of all the evidence and the statement, if any, of the accused, the court or magistrate shall either:
>
> (1) Find that the crime alleged has been committed and that there is probable and reasonable cause to hold or recognize defendant to appear before the court of common pleas of the county or any other county in which venue appears, for trial pursuant to indictment by grand jury;
>
> (2) Find that there is probable cause to hold or recognize defendant to appear before the court of common pleas for trial pursuant to indictment or information on such other charge, felony or misdemeanor, as the evidence indicates was committed by accused;
>
> (3) Find that a misdemeanor was committed and there is probable cause to recognize accused to appear before himself or some other court inferior to the court of common pleas for trial upon such charge;
>
> (4) Order the accused discharged from custody.

This formal "finding" section is well amplified by the new probable cause test of section 2937.13:

> In entering a finding, pursuant to section 2937.12 of the Revised Code, the court, while weighing credibility of witnesses, shall not be required to pass on the weight of the evidence and any finding requiring accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof. No appeal shall lie from such decision nor shall the discharge of defendant be a bar to further prosecution by indictment or otherwise.

When evidence is brought out at the hearing that there is probable cause to believe that the accused committed a crime *other* than the one charged, either misdemeanor or felony, there is a provision within the new procedure for filing ". . . with the papers in the case the text of the charge found by him (court or magistrate) to be sustained by the evidence."[55] This has the effect of bringing the altered charge before the grand jury, or in the case of misdemeanor, before another magistrate. The mere amendment of the warrant, under the old procedure, did not accomplish this.

The final provisions of the new preliminary examination define subpoena service limitations,[56] and the time duration of continuances.[57]

Issues, Rights, And Remedies

With the new era of criminal procedure in Ohio, several areas of legal significance are comment worthy, as their importance will undoubt-

the Accused—A Remedy For the Third Degree, 30 Mich. L. Rev. 1224 (1932).

[55] Section 2937.14.

[56] Section 2937.19, (Complaints to keep the peace, within the county; misdemeanors and ordinance offenses, anywhere within the state within one hundred miles of the place where the court or magistrate is scheduled to sit; in felony cases, service anywhere within the state).

[57] Section 2937.21, *supra* note 48.

edly be realized in future practice. First, the primary issue in *felony* matters, a workable concept of "probable cause", and secondly the vested right of an accused to the preliminary examination. Of further significance are the additional safeguards an accused has at his disposal.

The Concept of Probable Cause The issues to be decided at the hearing, in felony matters, are whether a crime *has* been committed, and whether the accused is probably guilty of that crime. In discussing the issues involved, the theories have been stated in terms of *probability* because the presumption of innocence prevails from the hearing to the grand jury's findings, and throughout the trial. The clearest case against the accused will still be phrased in terms of "probable guilt".

The new definition of probable cause, referred to above, while much more verbal than previous statutes still is subject to possible ambiguity—particularly upon varying fact patterns. To fully appreciate its statement, it must be read in the light of previous judicial interpretation.

The test used for the determination of discharge or "binding over" has been stated in several ways. Early Ohio phraseology was in terms of *suspicion.* For example, in 1798 the criteria was; "suspected to be guilty."[58] This can be contrasted with the long statement in 1806 that ". . . if the said court shall be of opinion from the testimony that it is not sufficient to create a suspicion of guilt, then the said court shall dismiss such criminal . . . ."[59] The more orthodox "probable cause" test was introduced into practice with the adoption of the Criminal Code of Procedure in 1869[60] and carried forward into recent practice, qualified by the necesity that ". . . it appears that an offense has been committed . . . ."[61]

A classic theoretical interpretation of "probable cause" was given within an early Ohio reference:

> The question of probable cause is a mixed proposition of law and fact: whether the circumstances alleged to show it probable or not probable are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law . . . .[62]

It is clear that indubitable proof of guilt was never a necessary criterion.[63] Rather, the element sought was a "probable connection" with the crime.[64] The articulate phraseology of Chief Justice John Marshall,

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[58] LAWS OF THE NORTHWEST TERRITORY, ch. 77, May 1, 1798. "Suspicion" as a criteria is traceable to the first justice of the peace acts in England; 34 Edw. 3, c.l, (repealed) (1360).

[59] OHIO LAWS, ch. 125 § 3, Jan. 27, 1806.

[60] 66 OHIO LAWS 287, 293 §§ 37, 38 (1869).

[61] 127 OHIO LAWS 1039, 1101 § 1 (1957) (former OHIO REV. CODE § 2937.11 effective 1-1-58) derived from 113 OHIO LAWS 123, 147 ch. 12 §§ 10,11 (1929).

[62] Ash v. Marlow, 20 Ohio 119 (1851) n.1.

[63] See an extensive early discussion in U.S. v. Lumsden, 26 Fed. Cas. 1013 (No. 15,641) (C.C.S.D. Ohio 1856).

[64] U.S. v. Thieman, 15 Ohio Law Reporter 250, 251 (comm'r opinion 1917). Present federal practice is governed by the 'probable cause' test; see FED. R.

sitting as committing magistrate to hear the charge of high treason against Aaron Burr, typifies the classic viewpoint:

> On an application of this kind I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reasons to believe that the crime alleged has been committed by the person charged with having committed it.[65]

In contrast to the classic view is the English *prima facie* theory. While the same result possibly might be reached, the application to particular facts is quite different. Upon the introduction of a certain quantum of evidence by the prosecution, a presumption arises. The burden then shifts to the accused to rebut the presumption. But to reach the stage of the *prima facie* case means: (a) *more* than a mere possibility or probability that the accused committed the crime; *and* (b) once the presumption has been attained, the theory is that if it remained uncontradicted *at the trial*, a reasonable jury could convict upon it alone.[66] The important distinction is that *if* it is thought that a jury would not convict on the evidence brought out at the preliminary examination, the charge should be dismissed—the effect of the strong presumption.[67]

Indicative of a clear-cut modern approach to defining probable cause in Ohio is the well reasoned standard found in a recent unreported municipal court magistrate's opinion.[68] The court stated three issues which the

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CRIM. P. 5(c); HOUSEL AND WALSER, DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES 228-247 (1946). See also, A.L.I. CODE OF CRIM. PROCED. §§ 54, 55 (1930); Miller, *supra* note 50 at 415.

[65] U.S. v. Burr, 25 Fed. Cas. 2, 12 (No. 14,692a) (C.C.D. Va. 1807).

[66] "Magistrates do not, as Lord Goddard, C.J., pointed out in Card v. Salmon (1953) 2 W.L.R. 301 . . . come to any decision when they are sitting as examining justices inquiring into an indictable offence; they merely reach a conclusion whether or not a *prima facie* case has been made out to send for trial. It follows that magistrates so acting have no power to state a case on a point of law, for no point of law can arise at that stage for their final decision." *Proceedings Preliminary to Trial on Indictment,* 97 SOL. J. 650 (1953).

[67] Canada too, follows the English rule, R. v. Cowden, (1947) 90 C.C.C. 101; Ex Parte Reid, (1954) 110 C.C.C. 260. See Savage, *Preliminary Inquiries,* 1 THE CRIM. LAW Q. 77, 79 (1958). Some American jurisdictions have adopted the *prima facie* theory in essence, see e.g., 22 C.J.S. *Criminal Law* § 337 (1940).

[68] State v. Dolvin, Municipal Court of Warren, Ohio. Case No. S-40649 (1957). The accused was arrested on an affidavit charging premeditated homicide, pleading not guilty. At the preliminary hearing, direct and cross examination of four witnesses for the state showed: (a) the gun found in the accused's home did not ballistically match the gun from which the fatal bullet was fired; (b) the deceased's wife testified that the accused and her husband were good friends, and that she did not know where the deceased had gone prior to his death. The Municipal court sustained the accused defendant's motion to dismiss the affidavit and discharged him, finding: (i) no witnesses testified to connection of the

State of Ohio must prove in any preliminary examination: (1) that the Court has jurisdiction; (2) that a crime has been committed; and (3) that the accused is probably guilty of the commission of the crime. A helpful explanation of probable cause is posed:

> Probable cause may be defined as a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a belief that the person accused is guilty of the offense with which he is charged.
>
> Further, by probable cause is meant merely appearances which justified the complaining witness in thinking the defendant guilty. There must be something of reasonable certainty that will convince the ordinary mind of the guilt of the defendant, such circumstances and surrounding facts that would lead a person of ordinary prudence to believe in his guilt. When such facts exist there is probable cause. A person is not bound to have evidence which will insure a conviction or absolutely convince him of the defendant's guilt but merely evidence sufficient to justify an honest belief in the guilt of the accused, or such circumstances must exist as would justify and warrant a reasonable, cautious and prudent man in believing that the accused is guilty.[69]

From the nebulous language of the Ohio statutes in the past "probable cause" in the magistrate's court has been susceptible to a full circle's interpretation: from a reasonable intelligent practical view, noted above, to mere discretionary conclusion. Any worthwhile concept of probable cause must have substance. It must mean reference to a balanced definite standard. Until the present reorganization any standard drawn has been unclear. In some cases magistrates have undoubtedly referred to no particular standard at all; resting their holding upon "appearances" or worse yet, a reluctance to dismiss the accused. Criminal prosecution is destined to stigmatize an individual, via societal pressure. It is only fair that standards used should be capable of equal interpretation. Fortunately the new legislation seems to be a step in the direction of justice, regarding future intrepretations of probable cause.

The Right to a Preliminary Examination. The breadth of an accused's rights regarding the examination is limited by duration of time: from arrest to indictment—which in Ohio makes the preliminary examination moot,[70] because the grand jury has substituted their finding of

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accused with the deceased at either the scene of death or any other place proximate to the time of death; (ii) ballistics showed no evidence that the accused's gun had been the murder weapon. Thus, the court stated that ". . . the State of Ohio has failed to prove by the evidence introduced in this case that the defendant was probably guilty of the offense charged." State v. Dolvin, *supra* at 9.

[69] *Id.* at 2.

[70] See Harper v. State, 7 Ohio St. 73 (1857); Newberry v. State, 7 Ohio C.C. Dec. 626 (1897). *Contra, e.g.,* CAL. CONST. art, I, § 8; 14 AM. JUR. *Crim. Law* § 240 (1938); U.S. v. Powlowski, 270 Fed. 285 (E.D. Penn. 1921); U.S. v. Kerr, 159 Fed. 185 (E.D. Penn. 1908).

probable cause. Preliminary examination is *not*—unfortunately—a prerequisite for indictment in Ohio.[71]

There is no Federal Constitutional right to a preliminary examination,[72] and although our state courts have never squarely ruled on the question, it is very doubtful that there is an Ohio Constitutional right involved.[73]

Strict observance of statutory provisions relating to criminal prosecutions generally is essential to the jurisdiction of the court to convict[74] but a lack or defect of the preliminary examination does not effect the trial court's jurisdiction when there is a proper indictment.[75]

Before indictment, a different approach obtains. There is no doubt that an accused may *compel* a preliminary examination before indictment, since the procedure is a statutory right. The appropriate remedy is *mandamus*, adequately supported by Ohio authority.[76] A major defect in the preliminary examination discovered either during the examination or while the accused is awaiting a grand jury's decision *should* be ground for jurisdictional attack.[77] This may be done by a writ of *prohibition* to cease the magistrate's examination,[78] or by a writ of *habeas corpus*, where the ac-

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[71] *Ibid.*

[72] The Due Process clause of the Fourteenth Amendment does not require a preliminary examination, Lem Woon v. Oregon, 229 U.S. 586 (1930); Ocampo v. U.S., 234 U.S. 91 (1914).

[73] *Cf.* Van Dam v. U.S., 23 F.2d 235 (6th Cir. 1928); Harper v. State, *supra* note 70.

[74] Goodin v. State, 16 Ohio St. 344 (1865); see 15 OHIO JUR.2d *Crim. Law* § 30 (1955).

[75] State v. Miller, 96 Ohio App. 216, 121 N.E.2d 660, (1953) *appeal dismissed*, 161 Ohio St. 467, 119 N.E.2d 618 (1954); Bowman v. Alvis, 88 Ohio App. 229, 96 N.E.2d 605 (1950). *But cf.* State v. Joiner, 28 Ohio Dec. 199, 20 Ohio N.P. (n.s.) 313 (1917).

[76] OHIO REV. CODE §§ 2725.01-.28 (1953). See State *ex rel* Maag v. Schuller, 154 Ohio St. 465, 96 N.E.2d 401 (1951); 35 AM. JUR. *Mandamus*, § 296 (1941); 25 OHIO JUR. *Mandamus*, § 212 (1932); 35 OHIO JUR.2d *Mandamus*, § 126 (1959). Mandamus cannot control judicial discretion; only judgment and functions, OHIO REV. CODE § 2731.03 (1953).

[77] An example of such a defect is deprivation of the right to counsel. OHIO CONST. art I § 10 (1851) provides: ". . . In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel . . . ." Assuming that Ohio would follow the better view, that the Federal Constitution and state constitution require the *right* to counsel at the preliminary hearing, *e.g.*, Lambus v. Kaiser, 352 Mo. 122, 176 S.W.2d 494 (1943), see *contra*, Roberts v. State, 145 Neb. 658, 17 N.W.2d 666 (1945), a magistrate depriving the accused of counsel would lose jurisdiction, *and* apparently all process would become void *ab initio*, see In Re Motz, 100 Ohio App. 296, 136 N.E.2d 430 (1955). See also historical discussion in Deckler v. State, 113 Ohio St. 512, 150 N.E. 74 (1925); Note, *Right to Counsel Prior to Trial*, 44 KY. L.J. 103 (1955).

[78] State *ex rel* Micheel v. Vamos, 144 Ohio St. 628, 60 N.E.2d 305 (1945); 32 OHIO JUR. *Prohibition*, §§ 21, 22 (1934). A theory has been constructed whereby mandamus is utilized to complete dismissal of the preliminary hearing, Inverarity v. Zumwalt, 87 Okla. Crim. 294, 262 P.2d 725 (1953).

cused is confined.[79]

Postponement of the examination beyond, or contrary to statutory provisions has meant automatic loss of jurisdiction for many years if the accused did not consent.[80] This requirement of some expediency, as enacted into the new procedure, is justified in *State ex rel Micheel v. Vamos*,

> . . . past experience has demonstrated that prosecutions too long delayed often amounts to persecution . . . it has always been the policy of our law to guarantee the accused a *speedy public trial.* We fined such a provision written into the Sixth Amendment to the Constitution of the United States (which applies to prosecutions in federal courts) and into the Constitution of Ohio . . . .[81]

Additional Safeguards Although the provisions of Amended Senate Bill No. 73, as enacted, create a wide reorganization of minor court criminal procedure in addition to the preliminary examination, and therefore not within the scope of this article, several procedural safeguards outside of the preliminary examination sections are here relevant.

The first is an important civil rights section allegedly based upon the Examining Court procedure, which should dissuade overzealous authorities from confining persons for any length of time without first bringing them before a magistrate. Section 2935.16 states:

> When it comes to the attention of any judge or magistrate that a prisoner is being held in any jail or place of custody in his jurisdiction without committment from a court or magistrate, he shall forthwith, by summary process, require the officer or person in charge of such jail or place of custody to disclose to such court or magistrate, in writing, whether or not he holds the person described or identified in the process and the court under whose process the prisoner is being held. If it appears from the disclosure that the prisoner is held solely under warrant of arrest from any court or magistrate, the judge or magistrate shall order the custodian to produce the prisoner forthwith before the court or magistrate issuing the warrant and if such be impossible for any reason, to produce him before the inquiring judge or magistrate. If it appears from the disclosure that the prisoner is held without process, such judge or magistrate shall require the custodian to produce the prisoner forthwith before him, there to be charged as provided in section 2935.06 of the Revised Code. Whoever, being the person in temporary or permanent charge of any jail or place of confine-

[79] OHIO CONST. art I § 8 (1851); OHIO REV. CODE §§ 2725.01, .02, .05 (1953); 26 OHIO JUR.2d *Habeas Corpus* § 12 (1957). *Cf.,* In Re Motz, *supra* note 77; Re Lockhart, 157 Ohio St. 192 (1952).

[80] 115 OHIO LAWS 530 § 1 (1933) (former OHIO REV. CODE § 2937.02); a ten day provision in present section 2937.21. Earlier Ohio law provided for 20 days limit, 66 OHIO LAWS 287, 292 § 32 (1869). And see A.L.I. CODE OF CRIM. PROCED. § 43 (1930), none more than two days, nor shall exceed in all, six days. See the very interesting case of State v. Ferguson, 100 Ohio App. 191, 135 N.E.2d 884 (1955).

[81] *Supra,* note 78 at 631.

> ment, violates this section shall be fined not less than one hundred nor more than five hundred dollars or imprisoned not more than ninety days, or both.

This new section is a very important tool to protect one detained unlawfully. And, while the purpose stated by the draftsmen of the section was to *augment* the Examining Court provision and broaden its scope,[82] it seems doubtful whether the Examining Court, under the premises discussed above is now intended for detention of *first instance.*[83] In any event the new section will adequately solve the problem of detention in the first instance.

The second important safeguard is the utilization of the Examining Court itself; a historic segment of Ohio criminal procedure, present section 2937.34. And while appeal from a preliminary examination was always a rather moot point, because of its lack of finality,[84] it is now clearly precluded by the new procedure, section 2937.13. However, a substitute for appeal is readily available to an accused in use of the Examining Court procedure.

As referred to above, the Examining Court in its early version was a hearing of *first instance,* serving the function of the present preliminary examination. In the sole construction of the Examining Court procedure during that era it was declared in *State v. Dawson*[85] that:

> The statute directing the mode of calling an examining court, has reference to a prisoner confined in jail, *in vacation.* The associate judges are to be notified; the prosecutor is to attend; and it is only in such case, that an examination into the circumstances of the charge is required.[86]

When the legislature created the preliminary *examination,* protecting rights at the first instance in 1869, the Examining Court became a type of "appeal" procedure; a re-examination of the finding of probable cause. In

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[82] *Report of Criminal Law Committee,* note 38, *supra* at 427, 428 commenting on the section stated: "This section is based on present 2937.34, where it is largley buried among unrelated material, and brought into the light of day near related matter. In addition it broadens the inquisitorial power to magistrates generally, is available from the moment of arrest and eliminates the faintly illogical notion that a sheriff who is unlawfully holding a prisoner is going cheerfully to carry messages from that prisoner to the common pleas judge." (referring to the Examining Court provision).

[83] See notes 21, 22, 23, 30, *supra,* and 87, 91, *infra.* The Examining Court provision, OHIO REV. CODE § 2937.34 (1953), is reprinted at note 90, *infra.*

[84] See OHIO REV. CODE § 2953.05 (1953); *cf.* State v. Bevacqua, 147 Ohio St. 20, 67 N.E.2d 786 (1946); State v. Theisen, 91 Ohio App. 489, 108 N.E.2d 854 (1952). However the question seems to have been raised in a Supreme Court dictum: "Whether the accused could appeal from the finding of . . . such preliminary examinations would present a grave legal question which is unnecessary of determination here.", State *ex rel* Micheel v. Vamos, *supra* note 78 at 633.

[85] 6 Ohio 251 (1834).

[86] *Id.* at 253.

effect this was a legislative overruling of the *Dawson* case.[87] The Ohio Supreme Court seemingly recognized this change of procedure when, in 1873, it announced its second and *last* construction, to date, of the Examining Court provision, in *Kendle v. Tarbell*:[88]

(Section 48, the examining court provision, being in *Article III—Bail*, of the act referred to; the preceding sections referred to were within *Article II—Examination*, sections 3 to 42, outlining the *preliminary examination*.) The *Kendle* case came up on facts where the petitioner had been indicted. The importance of the case is its holding that Examining Court procedure was not available after indictment, a condition subsequently written into the *present* statute.[90]

A 1957 decision, representing the first court of appeals interpretation reported—and the third and final reported case involving Examining Court procedure—reaffirmed the *Kendle* rule that the court was available only before indictment. There is an indication in the case that the fact of indictment will have the effect of ceasing any proceedings of the Examining Court—to be held, or in progress, or *appeal* therefrom. A challenging question was raised but left unanswered by the court: can an accused appeal from the finding of the Examining Court? Since the decision sustained the State's motion to dismiss the appeal for mootness, because the grand jury indicted, the question is left open.[91]

In terms of contemporary practice, what value does the Examining Court have? First, the procedure is available when an accused has been committed to jail on the charge of a non-bailable offense.[92] Second, it is

[87] That the procedure was to take on a different aspect seems warranted from the fact that the General Assembly in 1869 regrouped the examining court statute with the sections on bail, 66 OHIO LAWS 87, 294 (1869). While a reading of the statute *alone* might indicate that the procedure was one of first instance, as in earlier practice, the maxim *pari materia* should control.

[88] 24 Ohio St. 196 (1873).

> And section 48 is intended to apply only to persons committed on criminal charges, as provided in the preceding sections of the act.[89]

[89] *Id.* at 200.

[90] Present OHIO REV. CODE § 2937.34 (1953) provides: "When a person is committed to jail, charged with an offense for which he has not been indicted, and claims to be unlawfully detained, the sheriff on demand of the accused or his counsel shall forthwith notify the court of common pleas, and the prosecuting attorney, to attend an examining court, the time of which shall be fixed by the judge. The judge shall hear said cause or complaint, examine the witnesses, and make such order as the justice of the case requires, and for such purpose the court may admit to bail, release without bond, or recommit to jail in accordance with the commitment. In the absence of the judge of the court of common pleas, the probate judge shall hold such examining court." For the legislative history of this provision see note 22 *supra*.

[91] Howell v. Keiter, 104 Ohio App. 28, 146 N.E.2d 452 (1957).

[92] OHIO CONST. art. I § 9; bail for offenses, except those capital offenses where the proof is evident or the presumption of guilt great. See 7 OHIO JUR.2d *Bail and Recognizance*, § 9 (1954).

available when an accused cannot give recognizance for pecuniary reasons, and is committed to jail pending further action. Here the merit is obvious. A re-analysis of bail is possible, and a resulting release from confinement—if the Examining Court decides bail may be lowered. Third, the procedure *should* be available when an accused wishes to have the magistrate's finding re-analyzed, and voluntarily *refuses* to give recognizance in order that he may be committed to jail, giving him "standing" to request the Examining Court. With regard to the latter, it is apparent that in many cases an accused will have been denied, through inadvertence, or other reasons, an opportunity to convincingly present his case at the preliminary examination and hearing. It may be that having heard some evidence, defense counsel might be in a better position to rebut the case for probable cause—saving his client the stigma of a public trial. Furthermore, new witnesses might have been located, flaws developed in the state's case, and so on. The Examining Court does give the opportunity to (1) prevent the stigma accompanying a criminal trial; (2) present the refutation of probable cause to a common pleas judge—in many cases more familiar with criminal, and particularly felony prosecutions, and (3) have a more formal atmosphere conducive to the rules of evidence, and closer to the procedure of a trial.

The appraisal of the accused's case will rest upon the same criteria as the magistrate applied in the hearing. Again the Examining Court will look for probable cause[93] in determining whether to discharge, release without bond—recommit to jail, or admit the accused to bail.

The draftsmen of the new legislation in retaining the Examining Court provision commented that ". . . This is retained although its virtues are questionable and possibility of abuse great."[94] But understood in the light of its background and development from 1806 through the Code of 1869, there should be no question as to its uesfulness and value. The purpose of the process being its collateral safeguard for the accused, its necessity is duly justified.

The combination of the new civil rights section and the Examining Court process should greatly add to the newly reorganized preliminary examination, making for efficiency and protection for the accused.

Conclusion

Any rule of conclusion to be drawn regarding the new preliminary examination procedure is self evident. Contrasting the new procedure with pre-existing practice, it is obvious that a new era of criminal administra-

[93] Although the present statute is silent as to the test to be applied, it seems that the tests written into the statute from its inception to the present should guide interpretation: 1806-1808, opinion that there was a suspicion of guilt; 1808-1810, as the judges thought proper; 1810-1816, opinion that the prisoner was triable at common pleas; 1816-1831, a determination whether the prisoner ought to have been discharged; 1831-1869, at the judges' or judge's discretion; 1869-1932, *probable cause.*

[94] *Report of Criminal Law Committee,* note 38 *supra* at 446.

tion in Ohio should follow. The necessity for the new procedure was stressed by the Bar Association's Commttee report, juxtaposing past against present:

> The existing arrest, preliminary hearing and trial of misdemeanors procedures are largely a product of 19th century rural Ohio. They are built around the wise, but untutored, old Justice of the Peace . . . dispensing a rough but effective justice to disturbers of the peace around the kitchen table after the chores were done . . . The rural society is largely gone; the population is more mobile; no salaried officer of the law—and no trained lawyer—is more than 20 minutes away by telephone or car. The Justice . . . has degenerated and gone out of existence; the village mayor, as dispenser of justice, is on the way out . . . Modernization has consisted of a few incongruities . . . otherwise there is no form, no rhyme, no rule, no system.[95]

Now with the successful enactment of the Bill the responsibility lies with the Practicing Bar. Many of the objections levelled at the procedure of years past will be met by the new procedure. Opportunities heretofore not available will now be within reach to accused and his counsel, just as new duties will be trustfully placed upon the Judiciary. *But,* while the theory of the new procedure is ideally suited to protect the rights of society and those of the accused—the preliminary examination will fall far short of its ideal *unless* its effect is carried out in practice.

In the past, prosecution and defense—as well as a segment of the Judiciary—have viewed the procedure as largely perfunctory, when in fact expense, delay, and time waste of court officials, jurors, and others could have been avoided by determining—in a formal manner—whether further prosecution was needed. And in the past, local administration has stimulated ignorance of available procedure by judicial impatience and custom.

Again—the responsibility is with the Bar. Local customs and the familiarity with "the old rules" must not be allowed to cloud the benefits inherent in the new procedure, rather they should succumb to a strict observance of every letter of the new law.

Only through advocacy can established law become established uniform practice—a necessary ingredient of criminal justice.

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[95] *Report of Criminal Law Committee,* note 38 *supra* at 418.